

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

This matter comes before the Court on Plaintiff's Application for a Certificate of Appealability Under 28 U.S.C. § 2253 and Motion for Stay (Dkt. No. 31) and Defendant's Response (Dkt. No. 36). The Court has carefully considered these documents and the balance of the case file and has determined that oral argument is not appropriate. The Court finds and rules as follows.

Plaintiff is proceeding *pro se* and *in forma pauperis* in this 42 U.S.C. § 1983 civil rights case. He requests a certificate of appealability pursuant to 28 U.S.C. § 2253 and a stay so as to appeal United States Magistrate Judge Mary Alice Theiler's March 12, 2009, Order (Dkt. No. 25) denying his motion to amend his complaint. (Application for COA 1 (Dkt. No. 31).) The Court DENIES Plaintiff's application and motion for the following reasons.

01 First, as mentioned above, Plaintiff has filed a § 1983 civil rights complaint, not a
02 habeas petition.¹ The certificate of appealability that Plaintiff seeks may only be issued in a
03 habeas corpus proceeding under 28 U.S.C. § 2255. *See FED. R. APP. P. 22(b); 28 U.S.C.*
04 § 2253.

05 As such, the Court cannot issue a certificate of appealability pursuant to 28 U.S.C.
06 § 2253 as requested by Plaintiff.

07 Second, Plaintiff has already objected to the March 12, 2009, Order by filing a Federal
08 Rule of Civil Procedure 72(a) objection for consideration by the undersigned, (*see* Dkt. No.
09 27), and today the Court has overruled such objection. The Court does not find it appropriate
10 to stay the proceedings in this action so that Plaintiff may file a meritless appeal of the Order.

11 In addition, the Ninth Circuit has “jurisdiction of appeals from all *final decisions* of
12 the district courts.” 28 U.S.C. § 1291 (emphasis added). The instant action is still proceeding
13 and the district court has not yet entered a final judgment. As such, the Ninth Circuit presently
14 lacks jurisdiction over the issues Plaintiff raises. *See 15A CHARLES ALAN WRIGHT, ARTHUR*
15 *R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE* § 3914.1 (2d ed.
16 1991) (“Orders granting or denying amendment of the pleadings . . . are not final, unless
17 judgment is entered under Civil Rule 54(b) or exceptional circumstances persuade a court to
18 apply collateral order doctrine or some other expansive theory of finality.”) Accordingly, the
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22 ¹Defendant submits evidence showing that Plaintiff’s present incarceration is the result of
a 2007 felony Judgment and Sentence in which Plaintiff was sentenced to 84 months for
residential burglary. (Dkt. No. 37 at 6–10.) He is no longer in custody for the conviction associated
with his § 1983 complaint.

01 Court DENIES both the application for a certificate of appealability and the motion for a stay.

02 DATED this 28th day of April, 2009.

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06 John C. Coughenour
07 UNITED STATES DISTRICT JUDGE

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